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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JOHN M. WEIBLE,

Petitioner,

v.

DOCTOR'S ASSOCIATES, INC. and
FRANCHISE WORLD HEADQUARTERS, INC.,

Respondents.

Petition for a Writ of Certiorari
to the United States Court of
Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 12, 1996

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether a court of appeals may grant judgment as a matter of law pursuant to a post-verdict motion under Fed. R. Civ. P. 50(b) on grounds not raised in a pre-verdict motion under Fed. R. Civ. P. 50(a) under a manifest injustice standard?

(2) Whether a court of appeals may grant a judgment as a matter of law pursuant to a post-verdict motion under Fed. R. Civ. P. 50(b) after determining that the pre-verdict motion under Fed. R. Civ. P. 50(a) raised no discernible grounds for judgment as a matter of law, under a manifest injustice standard?

(3) Whether a court of appeals may grant judgment as a matter of law pursuant to a post-verdict motion under Fed. R. Civ. P. 50(b) on grounds not raised in the pre-verdict motion under

Fed. R. Civ. P. 50(a) without affording the opposing party an opportunity to present evidence which it contends would have cured the alleged deficiency?

PARTIES TO PROCEEDINGS

The parties are Doctor's Associates, Inc. and Franchise World Headquarters, Inc., Plaintiffs and John M. Weible, Defendant. There are many companies affiliated with the Plaintiffs with respect to the Subway Sandwich franchise store chain such as Subway Sandwich Shops, Inc., Subway Restaurants, Inc., Subway Real Estate Corp., Franchise Real Estate Leasing Corporation, and numerous leasing companies with "Subway" in their name, none of which are publicly traded. All such companies are either owned by Frederick DeLuca and Peter Buck, equally, or are subsidiaries of companies owned by them.

Petitioner is not aware of any other subsidiary, parent company, affiliate or shareholder which is

required to be listed pursuant to Rule 29.01.

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PETITION FOR A WRIT OF CERTIORARI

John M. Weible respectfully petitions for a writ of certiorari to review the judgment of the Second Circuit entered on August 12, 1996.

OPINIONS BELOW

The August 12, 1996 judgment of the Second Circuit is reported as *Doctor's Associates, Inc. and Franchise World Headquarters, Inc. v. John M. Weible*, 92 F.3d. 108 (2nd Cir. 1996) and is reprinted in the appendix.

JURISDICTION

This Court has jurisdiction to review the judgment of the Second Circuit under 28 U.S.C. §1254(1).

The Second Circuit had jurisdiction to review the judgment of the District Court under 28 U.S.C. §1291.

STATUTORY PROVISIONS INVOLVED

Fed. R. Civ. P. 50 (a) and (b), which are set forth in the appendix.

STATEMENT OF THE CASE

Doctor's Associates, Inc. ("DAI") is the national franchiser for Subway Sandwich Shops. It contracts with Franchise World Headquarters, Inc.("FWHI") to provide franchiser services to its franchisees and to otherwise perform the functions of the franchiser. Both companies are owned by Frederick DeLuca and Peter Buck on a 50-50 basis.

John M. Weible ("Weible")became a Subway franchisee in Los Angeles County, California during June, 1988. He took over an existing Subway store and immediately increase sales dramatically, receiving numerous awards. A dispute arose between Weible and DAI about Weible's right to purchase a second franchise for a reduced franchise fee.

Eventually Weible stopped paying royalties under the franchise agreement which permitted him to withhold payment in case of default by DAI.

DAI then employed its alter ego leasing company, Subway Sandwich Shops, Inc. to evict Weible from his Subway shop during October, 1990.

Weible then filed suit against DAI and others in Los Angeles County, California, but was compelled to arbitrate his claims against DAI in Connecticut by an order of the Superior Court of Los Angeles County.

Weible then filed an arbitration demand with the American Arbitration Association in Hartford, Connecticut. His lawsuit in Los Angeles County, California was stayed pursuant to the same order.

While the arbitration demand was pending and the Los Angeles County lawsuit was also pending (but stayed pending arbitration) DAI accused Weible of violating the federal wiretap statutes by allegedly listening to its voice mail messages. Leonard Axelrod, Vice President and Chief in-house Counsel for DAI and FWHI, advised Weible that he would be prosecuted criminally and civilly for violation of the federal wiretap statutes unless he dropped his arbitration demand and dismissed his Los Angeles County lawsuit. Weible refused.

Shortly thereafter, DAI attempted to assert a claim against Weible for alleged violations of the federal wiretap statute in the pending arbitration. Eventually the arbitrators determined that such claim was not within the scope of the arbitration

clause. Thereafter DAI and FWHI filed a complaint against Weible in the District court of Connecticut alleging violation of the federal wiretap statute and the Connecticut Trade Secrets Act.

Weible filed a counter-claim against DAI and FWHI for abuse of process claiming the wiretap complaint had been filed against him primarily for the ulterior purpose of coercing him to dismiss his arbitration claim and lawsuit instead of for the purpose of resolving a claim under the wiretap statute and the Connecticut Trade Secrets Act.

DAI and FWHI moved to dismiss the counter-claim alleging it was really an action for malicious prosecution not abuse of process, and that motion was denied by the District Court.

While the wiretap case was pending in the District Court of Connecticut, the arbitrators decided all issues in favor of Weible and awarded him $219,900.00.

Thereafter the wiretap case came to trial during June, 1995. DAI and FWHI claimed no damages for Weible's alleged violations of the wiretap statute and the Trade Secrets Act. They had marked as an exhibit their claim for attorney's fees in excess of $180,000.00 which they were prepared to submit against Weible in the event they were successful on their wiretap claims. In the arbitration DAI had claimed in excess of $330,000.00 in attorney's fees for attempting to assert a claim for $25,000.00 for alleged unpaid royalties. Those issues were decided against DAI in the arbitration.

Gerald Hadelman, a Subway franchisee closely affiliated with DAI and FWHI, had previously admitted violating the wiretap statute and listening to voice mail messages of DAI and FWHI and, when caught, had alleged that Weible had done the same.

DAI and FWHI chose to bring no charges or claims against Gerald Hadelman, who did not have a claim pending against them.

Weible denied violating the wiretap statute and Trade Secrets Act. DAI and FWHI called Hadelman as their witness. After testifying on direct examination that Weible had told him that he had listened to voice mail messages of DAI and FWHI, improperly, on cross examination he invoked the Fifth Amendment against self incrimination repeatedly.

Weible incurred attorney's fees and litigation expenses in the sum of $56,555.83 before the trial began.

The jury returned a verdict for Weible on the claims against him and in favor of Weible and against DAI and FWHI on his counter-claim, awarding Weible $95,000.00 in actual damages and $115,000.00 in punitive damages for abuse of process.

DAI and FWHI presented an oral pre-verdict motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a), which, according to the Second Circuit failed to raise "an oasis of an idea in this sandstorm of words." a-13.

The jury was instructed, without objection, that it could return a verdict in favor of Weible on his counter-claim if it found that DAI and FWHI began the lawsuit against Weible to

coerce him into settling the actions against them rather than primarily to bring him into account for what they believed to be his unauthorized use of their voice-mail system. a-17.

DAI and FWHI then filed a post-verdict motion under Fed. R. Civ. P. 50(b) contending that the tort of abuse of process, under Connecticut law, required something more that a ulterior motive, and also required some specific misconduct intended to cause specific injury outside of the normal contemplation of private litigation. a-15,16.

The Connecticut District Court denied the post-verdict motion, finding there was evidence to support the counter-claim for abuse of process, as charged in the instructions. a-17. The District Court reduced the actual damage

award from $95,000.00 to $56,555.83. Both sides appealed.

On appeal, in response to the argument that some other specific wrongful conduct during the pendency of the case was required, Weible included, in the appendix, the statement for attorney's fees of DAI and FWHI marked as an exhibit for trial but not offered into evidence, to show that DAI and FWHI regularly communicated with the FBI and the United States Attorney's office for Connecticut, attempting to convince them to bring criminal charges against Weible. a-29-a-32. In his appellate brief, Weible also included two letters from the U.S. Attorney's office, dated April 14, 1994 and February 14, 1995, addressed to Weible's attorney, advising Weible that criminal charges would be filed against him. a-27,28. The first

letter was dated shortly before an initial trial setting for the case and the second letter a few months before the trial. a-27,28,30,32.

Weible argued that if he had been given an opportunity to meet the claim presented in the post-verdict motion for the first time, he would have offered this evidence to show that DAI and FWHI had abused process by using information in the civil case to convince the U.S. Attorney's Office to inaccurately advise Weible that criminal charges would be brought against him for the purpose of coercing him to settle on DAI's terms. The litigation Between Weible and DAI and others in California is still pending, on appeal.

The Second Circuit granted the motion of DAI and FWHI to strike this material from the appellate record.

The appellate opinion mentions only that DAI and FWHI provided information to the FBI and U.S. Attorney's Office, and disregards the proposed evidence that the U.S. Attorney actually sent two letters to Weible inaccurately advising him that criminal charges would be filed. a-27,28. No criminal charges were ever filed.

The Second Circuit held that manifest injustice would result unless the Court disregarded the requirement that judgment as a matter of law may not be granted pursuant to a motion under Fed. R. Civ. P. 50(b) unless the grounds therefor were raised in a pre-verdict motion under Fed. R. Civ. P. 50(a). a-14.

REASONS FOR GRANTING THE WRIT

(1) The Court should grant the Petition to resolve the conflict between

the 3rd, 6th, 7th, 8th, 9th, 10th, 11th, D.C. and Fed. Circuits, which do not permit judgment as a matter of law pursuant to a post-verdict motion under Fed. R. Civ. P. 50(b) on grounds not raised in a pre-verdict motion under Fed. R. Civ. P. 50(a) and the 1st, 2nd, 4th, and 5th, Circuits which permit such judgments under manifest injustice or similar equitable standards.

The Second Circuit apparently interpreted Connecticut law to require that the coercive threat to prosecute Weible civilly and criminally for alleged wiretap violations be made after and not before the wiretap complaint was filed, to establish the required wrongful conduct. a-16,19,20. While it would seem that the requirement that the coercive threat be made after, instead of immediately before, the lawsuit was

filed is somewhat hyper-technical, this argument was not advanced by DAI and FWHI until after the verdict was rendered.

Fed. R. Civ. P. 50 was amended in 1991 to require that the pre-verdict motion articulate the basis on which a judgment as a matter of law might be rendered so that the responding party could seek to correct any overlooked deficiencies in the proof. The revision was intended to alter the result in cases in which the courts have used various techniques to avoid the requirement that a motion for a directed verdict be made as a predicate to a motion for judgment notwithstanding the verdict. Fed. R. Civ. P. 50(a), advisory committee notes, 1991 amendment with respect to paragraph (a)(2).

The amended rule retained the concept that the post-verdict motion is a renewal of the pre-verdict motion to avoid any question arising under the Seventh Amendment to the United States Constitution. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940).

"A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion. E.g., *Cutner Buick, Inc. v. American Motors Corp.*, 848 F.2d 614 (3rd Cir. 1989)." Fed. R. Civ. P. 50(b), advisory committee notes, 1991 amendment, subdivision (b).

Nine circuits currently enforce the rule that judgments as a matter of law may not be granted pursuant to a post-verdict motion under Fed. R. Civ. P. 50(b) on grounds not raised in a pre-verdict motion under Fed. R. Civ. P. 50(a), and that a pre-verdict motion

which fails to raise "an oasis of an idea in this sandstorm of words" (a-13) fails to preserve any ground for a post-verdict motion under Fed. R. Civ. P. 50(b). The 3rd, 6th, 7th, 8th, 9th, 10th, 11th, D.C., and Federal Circuits enforce the rule as written and do not permit deviations on equitable grounds such as the manifest injustice standard. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1172, 1173 (19,20)(3rd Cir. 1993), *Preferred RX, Inc. v. American Prescription Plan, Inc.*, 46 F.3d 535, 544 (8,9)(6th Cir. 1995), *U.S. Equal Employment Opportunity Commission v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1286, 1287 (12)(7th Cir. 1995), *Jones Truck Lines, Inc. v. Full Service Leasing Corp.* 83 F.3d 253, 258 (6)(8th Cir. 1996), *Murphy v. City of Long Beach*, 914 F.2d 183, 186 (2-4)(9th Cir.

1990), *First Security Bank of Beaver, Okla. V. Taylor*, 964 Fed.2d 1053, 1057 {3,4}(10th Cir. 1992), *Caban-Wheeler v. Elsea*, 71 F.3d 835, 842 {8-10}(11th Cir. 1996), *Whelan v. Abell*, 48 F.3d 1247, 1252, 1253 {4-6}(D.C. Cir. 1995), *Hoechst Celanese Corp. v. BP Chemicals, Ltd.*, 78 F.3d 1575, 1581, 1582 {11, 12}(Fed. Cir. 1996).

Whelan v. Abell held that the right to challenge new grounds for judgment as a matter of law asserted for the first time in a post-verdict motion could be waived by failing to contest the post-verdict motion on those grounds. Weible immediately responded to the post-verdict motion of DAI and FWHI by contending that it attempted to raise grounds not raised in the pre-verdict motion, and did not waive the right to

contest the post-verdict motion on those grounds.

On the other hand the 2nd Circuit, (a-1-22), and the 1st, 4th, and 5th Circuits have permitted post-verdict motions to raise new grounds for judgment as a matter of law under manifest injustice and similar equitable standards. *Simon v. Navon*, 71 F.3d 9, 13, 14 (1-5)(1st Cir. 1995), *Singer v. Dungan*, 45 F.3d 823, 828 (7,8)(4th Cir. 1995), *Polanco v. City of Austin, Texas*, 78 F.3d 968, 974, 975 (5-8)(5th Cir. 1996), a-1-22.

This court should grant the petition to resolve this conflict.

(2) In the alternative, the court should grant the Petition to establish the standards for determining manifest injustice or other equitable grounds for

avoiding the requirements of Fed. R. Civ. P. 50(a) and 50(b).

DAI and FWHI brought the wiretap and trade secrets claims against Weible with knowledge that they had suffered no actual damages, with the intent to assess their attorney's fees against him in a sum in excess of $180,000.00 if they prevailed, while failing to bring similar claims against Gerald Hadelman who had admitted improperly listening to their voice mail messages, after threatening Weible with civil and criminal prosecution for the alleged wiretap violations if he did not dismiss his pending arbitration demand and lawsuit in California. DAI and FWHI also knew Weible was without funds. The cost of arbitrating the claim on which he had been awarded $219,900.00 offset the amount of the award. DAI had

claimed $330,000.00 in attorney's fees in the arbitration allegedly incurred in attempting, unsuccessfully, to establish a $25,000.00 counter-claim against Weible. The Second Circuit, nevertheless, found that manifest injustice would result if DAI and FWHI were not permitted to raise, for the first time, grounds for judgment as a matter of law after the verdict was rendered. The manifest injustice standard employed by the Second Circuit provides that if a timely motion for judgment as a matter of law should have been granted, manifest injustice requires the court to grant an untimely motion. a-14. Apparently the Second Circuit disregarded the above listed facts which Weible contends should be considered in applying an equitable, manifest injustice standard.

Currently the "manifest injustice" standard grants a roving commission to the appellate courts. Manifest injustice, under this non-standard, obviously will vary from appellate panel to appellate panel and from circuit to circuit.

In the alternative, the court should grant the petition to establish uniform rules for determining the manifest injustice standard.

(3) In the alternative, the court should grant the Petition to determine the standard for affording the non-moving party an opportunity to present evidence which it contends would meet the alleged deficiency in the evidence raised for the first time after the verdict. DAI and FWHI did not object to the jury instruction on abuse of process which is contrary to the legal theory

they asserted for the first time after the verdict was rendered.

DAI and FWHI specifically did not move for a new trial. They did not wish to risk a higher punitive damage award that might result from a new trial. They narrowly tailored their post-judgment request for relief to judgment as a matter of law.

Weible contends that he brought before the court of appeals evidence which, if permitted, would have established the element of the tort of the abuse of process which the court of appeals found to be missing, i.e., some wrongful conduct during the pendency of the wiretap case. Weible submits that a jury could have found that DAI and FWHI regularly communicated with the FBI and the U.S. Attorney's Office, provided them with information obtained through

discovery in the civil case, attempted to convince them to file criminal charges against Weible, and, failing that, convinced the U.S. Attorney's Office to send Weible letters incorrectly advising him that criminal charges would be brought, for the purpose of attempting to coerce a global settlement of the disputes between Weible and DAI and FWHI on grounds favorable to them. a-27-32. The Second Circuit did not mention the letters from the U.S. Attorney's Office advising Weible that criminal charges would be brought, but did conclude that the proposed evidence, which had been stricken from the record before the court of appeals, could not establish wrongful conduct of the kind required for abuse of process under Connecticut law. a-20,21.

Fed. R. Civ. P. 50(a) and (b) require that a court not enter judgment against a party who has not been apprised of the materiality of the dispositive fact and afforded an opportunity to present any available evidence bearing on that fact. Fed. R. Civ. P. 50, Advisory Committee Notes, 1991 Amendment, paragraphs (a)(1).

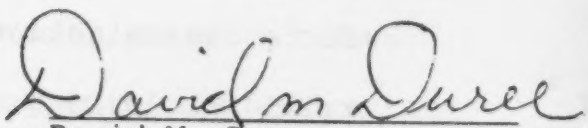
In ruling on motions for judgment as a matter of law under Fed. R. Civ. P. 50(b), appellate courts are not precluded from directing on their own motion that a new trial be had, or from remanding the case to the trial court for a determination as to whether a new trial should be granted. Fed. R. Civ. P. 50(d), Advisory Committee Notes, 1963 Amendment, citing *Weade v. Dichmann Wright & Pugh, Inc.* 337 U.S. 801 (1949).

In the alternative, Weible respectfully submits that the Petition should be granted to establish standards for determining the validity of the proposed evidence which the non-moving party was precluded from presenting because the grounds for the motion for judgment as a matter of law were not presented until after the verdict was rendered.

CONCLUSION

For one or more of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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